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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 268

PACIFIC FAR EAST LINE, INC., a corporation,
Petitioner,

vs.

JOHN WILLIAMS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

	Page
Opinions Below and Jurisdiction	2
Questions Presented	2
Statement	4
Reasons for Granting the Writ	12
1. First Question Presented for Review: The Scope and Applicability of the Rule Pertaining to Transitory Conditions	12
2. Second Question Presented for Review: Liability of the Ship Operator Who Has Furnished Adequate Equipment to Stevedore Engaged in Loading Vessel	19
3. Third Question Presented for Review: Failure of Appliance to Be Operated for Purpose Not Intended or Customary Does Not Constitute Unseaworthiness	23
4. Fourth Question Presented for Review: Sufficiency of the Evidence Adduced by Plaintiff on Essential Issues in the Case	25
Conclusion	28
Appendix.	

TABLE OF AUTHORITIES CITED

Cases	Pages
Adamowski v. Gulf Oil Corporation, 197 F.2d 523 (3d Cir. 1952) A.M.C. 1221, affirming 93 F. Supp. 115 (E.D. Pa. 1950), 1950 A.M.C. 2079, cert. denied 343 U.S. 906 (1952)	13, 14, 15
Barnett v. Terminal Railroad Association of St. Louis, 228 F.2d 756 (8th Cir. 1956)	26
Blodow v. Pan Pacific Fisheries, Inc., 128 Cal. App. 2d 428, 275 P.2d 795 (1954)	14, 15
Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1954)	16, 17
Boyce v. Seas Shipping Co., 152 F.2d 658 (2d Cir. 1945), 1946 A.M.C. 45	13
Brabazon v. Belships Co., 202 F.2d 904 (3d Cir. 1953), 1953 A.M.C. 737	13, 20
Commercial Standard Ins. Co. v. Gordon's Transports, 154 F.2d 390 (6th Cir. 1946)	26
Cookingham v. United States, 184 Fed. 2d 213, 1950 A.M.C. 1793, cert. denied, 340 U.S. 935 (1950)	13, 14, 15
Crawford v. Pope & Talbot, Inc., 206 F.2d 784 (3d Cir. 1953)	13, 14
Daniels v. Pacific-Atlantic S.S. Co., 120 F. Supp. 96 (E.D. N.Y. 1954), 1954 A.M.C. 806	13, 15
Edison Co. v. Labor Board, 305 U.S. 197, 229	4
Freitas v. Pacific-Atlantic Steamship Company, 218 F.2d 562 (9th Cir. 1955), 1955 A.M.C. 649	18, 21
Gladstone v. Matson Navigation Co., 124 Cal. App. 2d 493, 269 P.2d 132 (1954), 1954 A.M.C. 1004	14
Goldberg v. United States, 91 F. Supp. 104 (E.D.N.Y. 1950), 1950 A.M.C. 1226	20
Guerrini v. United States, 167 F.2d 352 (2d Cir. 1948)	13
Hawn v. Pope & Talbot, Inc., 99 F. Supp. 226 (E.D. Pa. 1951), 1951 A.M.C. 1604, modified on other grounds 198 F.2d 800 (3rd Cir. 1952), 1952 A.M.C. 1708, as modified, aff'd 346 U.S. 406 (1953), 1954 A.M.C. 1	13, 14

Pages

The Hindustan, 37 F.2d 932 (E.D.N.Y. 1930), 1930 A.M.C. 304 aff'd. per curiam 44 F.2d 1015 (2d Cir. 1930) 1931 A.M.C. 270 20

Holliday v. Pacific-Atlantic S.S. Co., 99 F. Supp. 173 (D. Del. 1951), rev'd on other grounds, 197 F.2d 610 (3d Cir. 1952), cert. denied 345 U.S. 922 (1953) 13, 15

Holub v. Sword S.S. Line, 132 Fed. 2d 206 (5th Cir. 1942) 1943 A.M.C. 898 ..... 24, 25

Hunt v. Hobbs, Wall & Co., 42 F.2d 437 (9th Cir. 1930), 1930 A.M.C. 1390 24

Kuykendall v. United Gas Pipeline Co., 208 F.2d 921 (5th Cir. 1953) 26

Lake v. Standard Fruit & Steamship Co. 185 F.2d 354 (2d Cir. 1950), 1951 A.M.C. 71 18

Larsson v. Coastwise (Pacific Far East) Line, 181 F.2d 6 (9 Cir. 1950), 1950 A.M.C. 769, cert. denied 340 U.S. 833 (1950) 22

Lindander v. States Steamship Co., 149 Ore. 605, 42 P.2d 156 (1935), 1935 A.M.C. 559 22

Long v. Silver Line, 48 F.2d 15 (2d Cir. 1931), 1931 A.M.C. 991 ..... 20, 21

Mahnich v. Southern S.S. Co., 321 U.S. 96 (1943) 25

McFall v. Compagnie Maritime Belge, 304 N.Y. 314 (1952) 107 N.E. 2d 463; 1952 A.M.C. 1860 16

McMahan v. The Panamolga, 127 F. Supp. 659 (D. Md. 1955) .. 14

Nelson v. United Fruit Co., 201 Fed. 2d 47 (2nd Cir. 1952), 1953 A.M.C. 146 22

O'Leary v. United States Line Company, 215 Fed. 2d 708 (1st Cir. 1954) 1954 A.M.C. 1772 ..... 20, 21

The Oscela, 189 U.S. 158 (1903) 25

Penna. R. Co. v. Chamberlain, 288 U.S. 333 (1933) 26, 28

Pietryzk v. Dollar Steamship Lines, 31 Cal. App. 2d 584, 88 P.2d 783 (1939), 1939 A.M.C. 1281 14

Pages

Poignant v. United States, 225 F.2d 595 (2d Cir. 1955) 13, 16, 17, 18, 21

The Queen Elizabeth, 209 Fed. 712 (N.D. Cal. 1913) 24

Riley, Admx. v. Agwilines, Inc., 290 N.Y. 402, 73 N.E. 2d 718 (1947), 1947 A.M.C. 1038 20

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 15
Shannon v. Union Barge Line Corp., 194 F.2d 584 (3 Cir. 1952), 1952 A.M.C. 686, cert. denied 344 U.S. 846 (1952) 13, 17
Shields v. United States, 175 Fed. 2d 743 (3rd Cir. 1949) 1949 A.M.C. 1355, cert. denied 338 U.S. 899 (1949) 21, 22
Sickles v. Graybar Electric Company, 219 F.2d 847 (7th Cir. 1955) 26
Stolper v. U.S.A. (E.D. Pa. 1950), 1950 A.M.C. 551 ..... 14, 15

STATUTES

28 U.S.C.
1254(1) 2
1332 5

TEXTS

2 Norris, The Law of Seamen, Sec. 615A (1955 Cum. Supp.) 17

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

PACIFIC FAR EAST LINE, INC., a corporation,
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vs.

JOHN WILLIAMS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Pacific Far East Line, Inc., respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on May 23, 1956, affirming the judgment of the United States District Court for the Northern District of California, Southern Division.

OPINIONS BELOW AND JURISDICTION

No opinion was filed in the United States District Court for the Northern District of California and consequently there are no reports.

The opinion of the Court of Appeals was filed May 23, 1956, and is unreported. A copy is reproduced in the appendix.

On June 20, 1956, an order was entered by the Court of Appeals staying issuance of mandate pending the filing, consideration and disposition by this court of petition for writ of certiorari to be made by petitioner herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before July 23, 1956.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner was, on October 29, 1952, the operator of the steamship *Fleetwood*. Respondent, John Williams, plaintiff below, was a longshoreman in the employ of an independent stevedore company, and was injured when he fell into the hold of that vessel under circumstances set forth in the "Statement" below. In a suit to recover damages arising out of those injuries the court below entered a judgment on a jury verdict in favor of respondent and the United States Court of Appeals for the Ninth Circuit affirmed.

The questions presented for review by this court are the following:

1. Is a ship operator liable because of unseaworthiness of the vessel, or for negligent failure to furnish a safe place to work, to a longshoreman in the employ of an independent stevedore company working on its vessel, who is injured as the result of a transitory condition created by the failure of the longshoremen, including the injured longshoreman, to make proper or full use of adequate lighting equipment

during the course of loading cargo on the vessel when the ship operator has no knowledge of the existance of such condition and such condition has not existed for a length of time which would warrant the inference that the ship operator ought to have known of it, i.e., had constructive knowledge?

2. Is a ship operator liable, either because of unseaworthiness of its vessel, or because of a negligent failure to furnish a reasonably safe place to work to a longshoreman, in the employ of an independent stevedore company, working on its vessel who is injured as the result of inadequacy of illumination where the ship operator furnished the longshoremen with an adequate number of suitable lights and the electric power to operate them?

3. Is a ship operator liable, either because of unseaworthiness of its vessel, or for a negligent failure to furnish a reasonably safe place to work, to a longshoreman in the employ of an independent stevedore company, working on its vessel who is injured as the result of the failure of an appliance to be put in operation in an area where, and for a purpose for which, it was not intended to function; or, expressed more in terms of the facts of this case, can liability of a ship operator to a longshoreman be predicated on a failure to have ceiling lights on in the hold while the longshoreman was performing the task of removing insulating plugs on top of the refrigerated cargo hold of the vessel, when the ceiling lights were intended solely for the purpose of lighting the wings of the hold and of giving illumination to longshoremen stowing cargo there, and were used only for that purpose?

4. Is there sufficient evidence in this case to meet the rule that a plaintiff must introduce substantial evidence to prove

his case which has been defined by this Court in the case of *Edison Co. v. Labor Board*, 305 U.S. 197, 229 as follows:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequte to support a conclusion."

While this question is applicable in evaluating the evidence on all ultimate factual issues in this case depending upon the rulings made by this Court on other questions raised in this petition, it is particularly important and applicable in connection with the possible existence of causal connection between the alleged failure to have on ceiling lights in the hold of the vessel at the time of the accident and the alleged lack of illumination on the hatch coaming from which respondent fell. In the terms and circumstances of this feature of the case the question may be expressed as follows:

> Should a jury vedict be upheld which was founded to any extent on the inference that certain lights would afford illumination in the area involved where all of the evidence introduced was to the contrary?

STATEMENT

At approximately 1:15 of the morning of October 29, 1952, respondent John Williams (plaintiff below), while working on the *Fleetwood* as a longshoreman in the employ of West Coast Terminals, Inc., an independent stevedore company, fell through the forward open section of No. 5 hatch of that vessel into the lower hold and sustained personal injuries. Williams fell as he was about to descend the ladder commencing at about the top of the hatch coaming. On October 27, 1953, Williams filed suit in the United States District Court for the Northern District of California

against petitioner, Pacific Far East Line, Inc., the operator of the vessel, for damages resulting from those injuries. The complaint alleged negligent failure to provide plaintiff with a safe place to work specifying certain particulars including inadequacy of lighting in and about the hatches. The same faults were alleged as factors creating unseaworthiness, except that the alleged lack of sufficient light is not claimed to be a factor causing an unseaworthy condition. Plaintiff's second amended complaint for damages is reproduced in the appendix.

Jurisdiction of the District Court was based upon diversity of citizenship under 28 U.S.C. 1332.

At trial no evidence was introduced as to any of the particular faults set out except as to alleged lack of sufficient light. Although not specified as a fault causing an unsafe condition evidence was introduced designed to show a slippery condition of the steps of the ladder on the face of the coaming, claimed to have been created by frost which plaintiff sought to prove was caused by cold from the refrigerated hold when one plug was removed.

On November 17, 1954, a jury verdict of $35,500 was rendered. Thereafter petitioner moved for a judgment notwithstanding the verdict or in the alternative for a new trial. Both motions were denied, the latter motion on the express condition that Williams remit in writing all damages above the sum of $28,000. Such damages were remitted in writing and on December 10, 1954, judgment was entered in favor of plaintiff in the amount of $28,000. The Court of Appeals for the Ninth Circuit affirmed this judgment.

A description of the area in which this accident occurred is important to an understanding of the facts of this case. The *Fleetwood* is a refrigerator or "reefer" type vessel of modified C-2 design. It has five cargo hatches of which the

aftermost is numbered 5 and is the one here involved. Immediately forward of No. 5 hatch is a platform about 20 inches above the main deck on which are mounted two winches. This winch platform is separated from the hatch opening by a coaming, the upper edge of which is 8¾ inches above the winch platform. A guard rail 3 feet 8½ inches high is mounted on the winch platform and runs athwartships entirely across the winch platform parallel to and a few inches forward of the hatch coaming. The winch controls are located amidships on the winch platform immediately behind the guard rail in such a position that the operator, or winch driver, can look over the rail and observe activities in the hatch below without danger of falling in.

The square of No. 5 hatch is about 20 feet by 30 feet. However, only the forward section (⅓ of the hatch) was being used on the night in question. This forward section contains the following covers, in the order in which they must be removed to open that end of the hatch for working cargo: (1) a canvas cover which is rolled back by hand; (2) a steel pontoon covering the entire forward section of the hatch which is lifted out by use of the winch and laid on deck to one side and (3) five hatch "plugs" each of which is 9 feet 6 inches long, 4 feet wide and 15 inches thick. These plugs when in position lie side by side across the forward section of the hatch, and are removed one at a time, commencing with the center or "key" plug, by use of the winch. They constitute the insulation at the top required for the refrigerated compartment and make a solid level surface about 2 feet 9 inches below the upper edge of the coaming surrounding the hatch. The top of the coaming is about 2 feet 4 inches above the main deck on each side of the hatch. Recessed in the face of the coaming at the forward end of the hatch and approximately amidships, are hand

and foot holds which constitute the upper steps of the ladder leading down into the hold. Access to the hold is, of course, possible only when the center or key plug has been removed.

Williams and the other men in his gang who gave testimony were experienced in working on refrigerator ships. The gang arrived on the vessel for the night shift and commenced preparation for loading frozen cargo into the No. 5 hatch at about 7:00 P.M. on the night of October 28, 1952. Prior to that time three cargo lights had been set out in the vicinity of the hatch by ship's personnel for the use of the longshore gang working that hatch. These cargo lights were large 300 watt, Mogul base lights with white oval reflectors. They were attached to 40 foot insulated cords and were plugged into sources of electricity at fixtures located nearby. These cargo lights were part of the regular ship's gear and were often used in the manner they were used in this case. They had been used by Williams' gang since commencement of the work; and, there is no evidence that they were not of the customary type, in good condition and entirely suitable for their proposed use.

The plugs were removed without incident shortly after the men came to work. From that time until midnight, cargo was loaded into the hold. Light in the area of the square of the hatch for this operation was furnished by the three cargo lights which were placed by the longshoremen according to their own ideas. Two lights were lowered down into the hold to light the square of the hatch in the lower hold where the men were working and the third was hung just inside the coaming at the forward inshore square of the hatch to furnish light for lowering drafts of cargo and removing empty slings. During the loading the temperature in the hold was about 10° to 12° Fahrenheit.

Because of this extreme cold the men working there, including Williams, relieved one another at one-half hour or one hour intervals. (There was a conflict of testimony on the precise interval.) In any event, Williams and his fellow workers descended into and climbed out of the hold several times during the five hours prior to midnight.

At midnight the men working in the hold ascended to the main deck for an hour recess and lunch. The cargo lights were drawn up out of the hold by the longshoremen and placed in the vicinity of the hatch. Apparently at least one light was placed on the winch platform, offshore side, so that it threw light across the top of the coaming and to some extent into the square of the hatch. The hatch plugs were then replaced in order to maintain the proper temperature.

Williams' gang returned to work at approximately 1:00 A.M. and, apparently by common understanding, Williams, together with another longshoreman, undertook the job of attaching the sling to the plugs. They proceeded into the square of the hatch and onto the tops of the plugs where they hooked the sling on the key plug. That plug was lifted out by the winch driver and swung to a position on deck near the ship's inshore rail where two other longshoremen unhooked it.

After the key plug, which is necessarily the first one taken out, had been hooked on to the sling, Williams, according to his testimony, climbed out of the hatch, using that part of the ladder above the level of the plugs, and moved along the top of the coaming to the offshore side of the hatch. His partner merely stepped to the offshore plugs, two of which were still in place. After the key plug had been lifted up out of the way, Williams came back along the coaming and was about to descend the ladder, apparently intending to return to the plug level to continue his work

of hooking on, when he slipped and fell. In the language of the Court of Appeals, he "stepped back and down with one foot, seeking to step onto a bar fixed within a recess in the coaming above the space where the plug had been. He slipped, fell through the opening in the hatch left by the removal of the key plug, and landed on cargo stowed in the lower hold * * *."

Neither Williams nor anyone else testified that his foot had reached the first bar in the face of the coaming when he slipped. The only two witnesses interrogated on that point, the winch driver and one of the men who had unhooked the plug after it had been landed on deck, testified that they heard someone "holler" and, upon looking, saw an object going through the opening left by the removal of the key plug. It was later learned that the object was Williams. Neither did any witness see Williams climb out before he fell, although the ladder was directly in front of but below the winch driver, or at any other time before the "object" was seen falling. It was the contention of respondent (plaintiff below) that frost or ice had formed on the first step of the ladder in the coaming of the hatch—this by inference. There was no direct testimony that such was the fact. This step was 2′ 9¼″ above the top of the "freeze" hold. It was also contended that because of inadequate light he was prevented from seeing the frost and slipped and fell as a consequence. The evidence is not clear as to exactly where the three cargo lights were located on deck during the midnight lunch hour or where they were at the time Williams fell. But, at least one of them was on the winch platform and apparently on its side so that it cast some light in the square of the hatch. There was uncontradicted testimony that it was the practice of the longshoremen to use the cargo lights as they saw fit; and, that they

could have been, and generally are, hung by the longshoremen from the offshore side of the guard rail running along the forward end of the hatch, or placed on the nearby pontoon at the after end of the forward section of the hatch, or held by hand by another longshoreman and directed into the square of the hatch to furnish light for those hooking onto the plugs. This practice was consistent with the practice of the longshoremen to arrange the booms and cargo gear as they deemed necessary. One or more of these lights could have been used to cast bright light onto the tops of the plugs, an area about 20 feet athwartships and 9 feet 6 inches fore and aft.

Respondent introduced testimony at the trial designed to show that lights in the wings of the hold were not on, that they were supposed to be on and contended that had they been on some light would have gone up through the opening left by removal of the key plug and furnished some light for Williams' use in descending the ladder. The lights in question were 60 watt lights enclosed in cylindrical metal fixtures affixed to the ceiling, or overhead of the hold, and set back several feet from the square of the hatch. The evidence was uncontradicted that they were designed, and used solely, to furnish light in the hold for the men stowing cargo there. They had at the bottom of the cylinder heavy amber colored glass and because of the cylindrical fixtures in which they were set light was directed only downward where, in stowing, light was needed. They were about 10 feet apart and consequently only one on each side of the square of the hatch was approximately opposite the section in use. No evidence was introduced that these lights were intended to or would illuminate the hatch coaming from which Williams fell. The only witness questioned as to whether these lights would cast any light on the hatch coaming testified that no dis-

cernible light was cast. This testimony was based on actual observation during the running of a test.

There is no evidence that petitioner had knowledge of any insufficiency of illumination at the place where Williams fell or that such lack of illumination had existed such length of time that petitioner ought to have acquired knowledge. The evidence is uncontradicted that Williams fell within two or three minutes after he and the other men returned to work; but any illumination from the ceiling lights in the hold could not have become a factor until the key plug had been removed, and any dangerous condition could not have arisen until ice formed, if, indeed, it did. The elapsed time between removal of the plug and the accident was probably not more than 60 seconds. So the period of danger, if any, caused by lack of any illumination and presence of frost was extremely short.

As to the existence of any ice or frost on the coaming at the place from which Williams fell, the only direct evidence was offered by a witness who testified that immediately after Williams fell he observed frost or fog forming on the face of the coaming. No other witness testified on this point and Williams himself did not testify that he slipped on any such frost or ice. Petitioner presented a motion to the court asking that the jury be directed to disregard this testimony, but the motion was denied and the jury was permitted to infer that Williams slipped on the "frost or fog" observed in the general vicinity of where the falling object was seen by this witness subsequent to the fall. Another witness, who was able to qualify as an expert on refrigeration, testified to the effect that ice could be expected to form on the hatch coaming of a refrigerated compartment above the level of the tops of the plugs after the key plug was removed. This witness did not give any opinion as to pre-

cisely how long it would take ice to form after removal of the key plug at point of contact of the two airs or as to how high above the level of the reefer compartment, which was the bottom of the plugs, frost would form, or how soon—particularly at the place where Williams testified he slipped.

There is no evidence whatsoever that petitioner had any knowledge, actual or constructive, of the presence of any frost, if there was any, at the place from which Williams fell.

The elapsed time between the removal of the plug and Williams' fall was probably not more than 60 seconds, but certainly much less than two minutes. The only testimony bearing on this was that the whole job of removing the 5 plugs would take from 5 to 8 minutes, or from one minute to one minute and 36 seconds to a plug. But that part of the job involved in hooking on and getting out of the way had been done, and the sling had not yet been lowered for the next plug when Williams fell—it had been swung only part way back after the key plug was unhooked near the rail.

REASONS FOR GRANTING THE WRIT

1. First Question Presented for Review: The Scope and Applicability of the Rule Pertaining to Transitory Conditions.

The decision of the court below on this question is in error and is in conflict with decisions of other courts of appeals on the same question.

As the statement of facts herein shows the conditions which were alleged to have been unsafe existed for not more than a minute and a half and were created by the longshoremen, one of whom most directly concerned was Williams.

Petitioner contended in both courts below with respect to the alleged presence of frost and any insufficiency of illumi-

nation at the place from which respondent fell, that these conditions, if they existed at all, were transitory conditions of an otherwise sound portion or appurtenance of the vessel; and that therefore they could not constitute a ground for liability based on unseaworthiness, nor because of any failure to furnish a safe place to work, since petitioner had no knowledge of the existence of the conditions, nor had they existed such length of time as to charge petitioner with such knowledge.

Petitioner's position as to negligence has long been recognized as applicable to the duty owed by a property owner to an employee or business invitee.[1] Petitioner's position as to unseaworthiness is now well established by the decision of the Court of Appeals for the Third Circuit in *Cookingham v. United States*, 184 Fed. 2d 213, 1950 A.M.C. 1793, *cert. denied*, 340 U.S. 935 (1950) and other decisions of that court,[2] the Court of Appeals for the Second Circuit,[3] and numerous District Court and State Court cases.[4]

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1. *Brabazon v. Belships Co.*, 202 F.2d 904 (3d Cir. 1953), 1953 A.M.C. 737; *Guerrini v. United States*, 167 F.2d 352 (2d Cir. 1948).

2. *Adamowski v. Gulf Oil Corporation*, 197 F.2d 523 (3d Cir. 1952), 1952 A.M.C. 1221, affirming 93 F. Supp. 115 (E.D. Pa. 1950), 1950 A.M.C. 2079, *cert. denied* 343 U.S. 906 (1952); *Shannon v. Union Barge Line Corp.*, 194 F.2d 584 (3 Cir. 1952), 1952 A.M.C. 686, *cert. denied* 344 U.S. 846 (1952).

See also *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (3d Cir. 1953); *Brabazon v. Belships Co.*, 202 F.2d 904 (3d Cir. 1953), 1953 A.M.C. 737.

3. *Boyce v. Seas Shipping Co.*, 152 F.2d 658 (2d Cir. 1945), 1946 A.M.C. 45; *Poignant v. United States*, 225 F.2d 595 (2d Cir. 1955); *Grillea v. United States*, 232 F.2d 919 (2d Cir. 1956) *semble*.

4. *Daniels v. Pacific-Atlantic S.S. Co.*, 120 F. Supp. 96 (E.D. N.Y. 1954), 1954 A.M.C. 806; *Hawn v. Pope & Talbot, Inc.*, 99 F. Supp. 226 (E.D. Pa. 1951), 1951 A.M.C. 1604, *modified on other grounds* 198 F.2d 800 (3rd Cir. 1952), 1952 A.M.C. 1708, *as modified, aff'd* 346 U.S. 406 (1953), 1954 A.M.C. 1; *Holliday v. Pacific-Atlantic S.S. Co.*, 99 F. Supp. 173 (D. Del. 1951), *rev'd on other grounds*, 197 F.2d 610 (3d Cir. 1952), *cert. denied* 345 U.S. 922

The decision of the court below is inconsistent in substance, with the decision in *Cookingham v. United States, supra,* and the cases following it, including the other Court of Appeals, District Court and State Court cases cited above. While in terms merely describing the *Cookingham* case as "doubtful" authority in the Ninth Circuit, the court below actually reached a conclusion on the issue of lighting in direct conflict with that case and the cases following it. The pertinent language of the court below is as follows:

> "Here, however, as already seen, there was evidence of a condition, *attributable to the ship,* of insufficient lighting which might well be thought to have been responsible for appellee's mishap. *Even though the condition of inadequate lighting be regarded as 'transitory', that fact would obviously not serve to absolve appellant of liability.*" (Emphasis added.)

There can be no distinction between the transitory character of the insufficient illumination in our case and that of the jello on the stairs in the *Cookingham* case, *supra,* or any of the numerous other judicially recognized transitory conditions. In fact the instant case is much stronger on the facts. That illumination is a proper subject for the application of the transitory conditions rule was clearly held by the Court of Appeals for the Third Circuit in *Adamowski v. Gulf Oil Corporation.*[5]

(1953); *Stolper v. U.S.A.* (E.D. Pa. 1950), 1950 A.M.C. 551; *McMahan v. The Panamolga,* 127 F. Supp. 659 (D. Md. 1955); *Pietryzk v. Dollar Steamship Lines,* 31 Cal. App. 2d 584, 88 P.2d 783 (1939), 1939 A.M.C. 1281; *Gladstone v. Matson Navigation Co.,* 124 Cal. App. 2d 493, 269 P.2d 132 (1954), 1954 A.M.C. 1004; *Blodow v. Pan Pacific Fisheries, Inc.,* 128 Cal. App. 2d 428, 275 P.2d 795 (1954).

5. *Supra* note 2.
See also *Hawn v. Pope & Talbot, Inc., supra* note 4; *Crawford v. Pope & Talbot, Inc., supra* note 2.

The court below may have been attempting to distinguish the rule of the *Cookingham* case as to the lighting on the theory that its inadequacy was thought to be "attributable to the ship." This last quoted phrase has no clear meaning. If it is intended to mean the equivalent of *caused by the vessel or by her officers or crew*, the statement has no foundation in fact and is in any event inconsistent with the basis for the transitory condition rule. In a number of the cases applying the rule it is clear from the evidence that the transitory condition must have been caused by the vessel or her personnel; but this point was not allowed to affect the holdings.[6] It is petitioner's position that seaworthiness, or the lack of it, depends solely on the nature of the condition, to wit: was it transitory, not the identity of the persons causing it.

It is petitioner's position that *Cookingham v. United States*, supra, and the other cases involving transitory conditions cited above, was correctly decided in accordance with recognized principles of the law of negligence and the historic maritime doctrine of unseaworthiness which was made applicable to longshoremen by *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). Seaworthiness has never been synonymous with safety and the doctrine is properly applied only to unsound, worn out or other inherently defective conditions of vessel or appliances. If a condition is merely transitory, it is not an unseaworthiness, although it may be a basis for liability for negligent failure to furnish a safe place to work where, but *only* where, there has been a negligent failure to correct the condition after it has become known or ought to have become known, in accordance with

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6. *Adamowski v. Gulf Oil Corporation*, *supra* note 2; *Holliday v. Pacific-Atlantic S.S. Co.*, *supra* note 4; *Stopler v. U.S.A.*, *supra* note 4; *Daniels v. Pacific-Atlantic S.S. Co.*, *supra* note 4; *Blodow v. Pan Pacific Fisheries, Inc.*, *supra* note 4.

the universally accepted principles of the law of negligence applicable to employees and business invitees.[7]

The holding of the court below on this issue conflicts in principle with a decision of this court.

In *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1954) this Court held that, while the doctrine of seaworthiness applies as well to the crew as to the ship, nevertheless "it does not mean that the owner is liable every time a seaman gets drunk and does damage to a member of the crew" (348 U.S. 336, 339); rather, unseaworthiness in respect of the crew requires "a seaman with a wicked disposition, a propensity to evil conduct, a savage and vicious nature" (348 U.S. 336, 340). This language can only be construed to mean that a vessel is not unseaworthy because a seaman of average disposition becomes dangerous because of intoxication or some other reason and assaults another seaman. This is a transitory condition.

This Court drew an analogy between a seaman of vicious nature and traditional unseaworthiness of a non-transitory character such as a rope with a weak strand or a hull with a latent defect. By the same token a temporarily drunk or angry seaman, while for the moment as dangerous as one with a vicious nature, does not make a vessel unseaworthy because this unsafe condition is a transitory one. This analysis was made by Judge Hincks in *Poignant v. United States*, 225 Fed. 2d 595 (2d Cir. 1955), as follows (p. 598):

> "We think the import of the *Boudoin* case is that just as the vessel is not unseaworthy because of the misbehavior of a seaman whose disposition and skill is the equal of that of ordinary men in the calling, so it does not become unseaworthy by reason of a temporary

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7. See generally on the status of a longshoreman as a business invitee:

McFall v. Compagnie Maritime Belge, 304 N.Y. 314 (1952) 107 N.E. 2d 463; 1952 A.M.C. 1860.

condition caused by a transient substance if even so the vessel was as fit for service as similar vessels in similar service."

In treating a transitory condition, i.e., any momentary insufficiency of light as an unseaworthiness the court below held contrary to the holding of this court in the *Boudoin* case, supra. It may be pointed out also that any insufficiency of light could create a perilous situation only because of frost, which was also momentary.

The question of the application of the transitory condition rule to the doctrine of seaworthiness is of vital importance in federal maritime law and should be settled by this Court.

Not less than 16 reported cases in the Courts of Appeals, United States District Courts and State Courts have applied the rule in varying factual circumstances[8] and a leading text has approved it.[9] Only the opinion in the court below has been found which appears to repudiate it. There has, however, not always been agreement as to its meaning and manner of application and considerable confusion has resulted.[10]

It is petitioner's position that the rule applied to the

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8. See cases cited in notes 1, 2, 3 and 4, *supra*.

9. 2 *Norris, The Law of Seamen*, Sec. 615A (1955 Cum. Supp.).

10. Thus in *Shannon v. Union Barge Line Corp., supra*, there is a suggestion that the rule should be applied only where there is evidence that someone other than vessel personnel could have caused the transitory condition; and in *Poignant v. United States, supra*, there is a hint that the transitory condition rule is merely an application of the principle that seaworthiness means only *reasonable* fitness. Also in *Grillea v. United States, supra*, it was apparently held that the length of time an unsafe condition consisting of an improperly placed hatch cover could exist in order to be deemed an unseaworthiness is to be judged in the light of whether the article is thought to have been put permanently in place.

transitory conditions is a necessary and integral part of the doctrine of unseaworthiness for the reason that, without it, that doctrine would render the shipowner the insurer of virtually all injuries on his vessel from whatsoever cause. That the doctrine of seaworthiness is not intended to render the vessel owner such an insurer has been stated on many occasions.[11] Yet, if unseaworthiness is to be found in every case where there is even a temporarily unsafe condition the shipowner would be found liable in virtually every case of a fortuitous circumstance causing injury. For example, were lightning to strike the ship and start a fire or knock a mast to the deck, the vessel would at that moment be unseaworthy, though the unsafe condition would be transitory. Likewise, if a fellow stevedore negligently handled the ship's gear and dislodged a strongback causing it to fall into the hold and injure a workman, the vessel would be unseaworthy for at least the momentary period between the dislodging of the object and the causing of the injury to the man below. Furthermore, a workman or seaman proceeding to his place of work at night would have to be preceded by a mate to make sure that he turned on all lights as he went, or used his flashlight, since his failure to use the lights, although momentary, would render the area dark and unsafe and therefore unseaworthy. There is, in short, in virtually every case of physical injury some short period of time when there was an unsafe condition immediately preceding and at the time of the accident.[12] It can hardly be argued that a vessel with a temporarily drunk

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11. *Freitas v. Pacific-Atlantic Steamship Company*, 218 F.2d 562 (9th Cir. 1955), 1955 A.M.C. 649; *Lake v. Standard Fruit & Steamship Co.*, 185 F.2d 354 (2d Cir. 1950), 1951 A.M.C. 71.

12. See the opinion of Judge Hand in *Grillea v. United States*, 232 F.2d 919 (2d Cir. 1956).

and belligerent seaman was not unsafe for the time being. Nevertheless, this court has held that such a situation is not one of unseaworthiness.

Furthermore, if the doctrine of unseaworthiness is to be deemed to include even transitory conditions, then the traditional right of the longshoreman, as a business invitee, to recover for negligent failure to furnish a safe place to work is included in the right to recover for unseaworthiness. Likewise in seamen's cases the right to recover in negligence would be rendered mere surplusage.

It is, therefore, respectfully submitted that because of the present uncertainty as to the scope and application of the rule which has been applied to transitory conditions the question should be settled by an opinion of this court. There can be no doubt that the question has now become a most important one in maritime law.

2. Second Question Presented for Review: Liability of the Ship Operator Who Has Furnished Adequate Equipment to Stevedore Engaged in Loading Vessel.

The decision below on this question was in error and is in conflict with decisions of other courts of appeals.

This question was not dealt with, expressly, by the court below in its written opinion although presented by the briefs and argued by counsel both there and in the trial court. Before both courts petitioner took the position that the furnishing by the ship operator of an adequate number of suitable lights and the electric power to operate them fulfilled the ship operator's duty to the longshoremen respecting illumination. As stated earlier in this petition, the evidence introduced at trial supports without substantial contradiction the application of this rule.

The rule was established as the law in the First Circuit in *O'Leary v. United States Line Company*, 215 Fed. 2d 708

(1st Cir. 1954) 1954 A.M.C. 1772. That court affirmed a judgment entered on a directed verdict for the defendant using the following language:

> "The hold was dangerous only because it was dark, and certainly there was nothing hidden about that danger. Thus any finding of the defendant's negligence must be predicated on a duty to light. But, under the arrangement with the master stevedore, and in accordance with the practice generally followed, the ship's duty was only to provide an adequate number of suitable lights, and the electric power to operate them (and, perhaps, to connect them), while it was the master stevedore's duty to request such lights as he thought were required and to place them where he thought they were needed. On the evidence it could not be found that the shipowner failed in the performance of its duty. That is to say, there is no evidence that suitable lights were not available on the ship in adequate quantity, or that the lights supplied were defective, or that current was not continuously available to operate them."

Likewise the rule was recognized by the Third Circuit in *Brabazon v. Belships Co.*, 202 Fed. 2d 904 (3rd Cir. 1953), 1953 A.M.C. 737, where, however, the court found that there was evidence that the ship was requested to supply additional lights from time to time prior to the accident but had failed to do so. The rule has also been applied by the Court of Appeals for the Second Circuit[13] and in a State Court[14] and District Court[15] decisions.

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13. *Long v. Silver Line*, 48 F.2d 15 (2d Cir. 1931), 1931 A.M.C. 991.

14. *Riley, Admx. v. Agwilines, Inc.*, 290 N.Y. 402, 73 N.E. 2d 718 (1947), 1947 A.M.C. 1038.

15. *Goldberg v. United States*, 91 F. Supp. 104 (E.D.N.Y. 1950), 1950 A.M.C. 1226; *The Hindustan*, 37 F.2d 932 (E.D.N.Y. 1930), 1930 A.M.C. 304 *aff'd. per curiam* 44 F.2d 1015 (2d Cir. 1930) 1931 A.M.C. 270.

In failing to recognize the rule contended for by petitioner the court below acted contrary to these decisions of the Courts of Appeals for the First, Second and Third Circuits.

The state of the law in the Second Circuit, despite the decision of *Long v. Siver Line, supra,* (note 13), has been placed in a state of confusion by the very recent decision of that Court in *Grillea v. United States*, 232 Fed. 2d 919 (2d Cir. 1956). It was there held that the shipowner was liable to a longshoreman on the theory of unseaworthiness with respect to hatch covers when proper hatch covers were furnished the longshoremen but they had been improperly placed. This condition lasted for only a comparatively short period of time (the precise time does not appear); but the court stated that on the facts the misplaced cover had "* * * become as much a part of the tween deck for continued prosecution of the work, as though it had been permanently fixed in place." Judge Swan dissented on the ground that injuries caused by improper use of proper gear by a stevedore is not a basis for liability because unseaworthiness is *not* created.[16]

The decision of the court below is also in conflict with decisions of courts of appeals of other circuits holding generally that where the ship operator has furnished adequate equipment and devices for the safety of seamen it has discharged its duty to furnish a seaworthy vessel, and indeed a safe place to work, even though the seamen fail to utilize such devices and equipment. This was the holding in *Shields v. United States*, 175 Fed. 2d 743 (3rd Cir. 1949) 1949

16. Compare *Freitas v. Pacific-Atlantic Steamship Company*, 218 F.2d 562 (9th Cir. 1955), 1955 A.M.C. 649, and *Berti v. Compagnie De Navigation Cyprien Fabre*, 213 F.2d 397 (2d Cir. 1954).

A.M.C. 1355, *cert. denied* 338 U.S. 899 (1949) and *Nelson v. United Fruit Co.*, 201 Fed. 2d 47 (2nd Cir. 1952), 1953 A.M.C. 146.[17]

The question is one of great importance in federal maritime law which has not been, but should be, settled by this court.

The entire working relationship between ship's officers and stevedores, and consequently the basic stevedoring policies of both steamship operators and stevedore companies, depends upon the resolution of this basic question. The almost universal modern practice of the industry is to hire independent stevedore companies to perform the work of loading and discharging cargo. Tools, equipment and facilities are turned over to the stevedore company who is relied upon to perform the work in a proper and workmanlike manner. Because of this arrangement stevedore companies employ their own workmen and supervisory personnel, including gang bosses in charge of each gang, and walking bosses in charge of the handling of cargo on an entire vessel. These men are in actual working control of the work being done. In the safety rules established and published jointly by shipowners, operators, stevedore companies and the longshoremen's unions these various bosses and other longshoremen are given precise responsibilities for safe working methods.

This being the established and agreed-upon state of affairs in the maritime industry, steamship operators do not exercise direct supervision over the work of the longshoremen. At the vessel level this means that mates and other ship's personnel are not charged by their employers with

17. To the same effect are *Larsson v. Coastwise* (Pacific Far East) *Line*, 181 F.2d 6 (9 Cir. 1950), 1950 A.M.C. 769, *cert. denied* 340 U.S. 833 (1950), and *Lieflander v. State Steamship Co.*, 149 Ore. 605, 42 P.2d 156 (1935), 1935 A.M.C. 559.

the duty of exercising such supervision, and in actual practice they do not do so. Indeed, at night all vessel personnel, except a night mate, night engineer and sometimes other maintenance men, are generally permitted to go ashore.

Plainly, if ship operators are to be held liable for the manner in which the stevedores and individual longshoremen utilize the equipment furnished them and otherwise perform their work, as well as for the sufficiency of the equipment furnished, substantial changes will have to be made in operating arrangements and procedures throughout the industry so that the actual responsibility of the parties and their employees will coincide with their legal responsibilities and potential liabilities.

These important industry-wide business and operating considerations, together with the considerable amount of litigation which has resulted in difficult and conflicting decisions of lower courts require that this court now undertake to review and resolve this question.

3. Third Question Presented for Review: Failure of Appliance to Be Operated for Purpose Not Intended or Customary Does Not Constitute Unseaworthiness.

The decision below on this question is in error and is in conflict with a decision of other courts of appeals and with decision of this court.

In the court below reliance was apparently placed on testimony that certain hold lights were not turned on. In the words of the opinion written by Judge Healy:

> "There was testimony that the small lights attached to the tween deck overhead, for illuminating the tween deck hold, were not turned on at this time. These lights are under the control of the ship's officers and are supposed to be on at all times; and the jury might well have inferred that had they been on they would have cast sufficient illumination on the hatch coaming to help

substantially in revealing to appellee the slippery condition of the surface on which he was about to step."

Petitioner pointed out in the court below and in the trial court that these lights were not designed or intended or used to light the hatch coaming or the upper surface of the plugs but rather were to afford illumination to men engaged in the work of stowing cargo in the wings of cargo compartment in which longshoremen were working. At the trial four witnesses, viz., the chief mate, the night mate (an old time ship's master), the chief engineer and the longshore gang boss testified that these lights were intended for the latter purpose and were used for that purpose only. No witness testified that these lights were intended or designed or were used to light the hatch coaming or plugs or to furnish illumination for the task of removing the plugs. Indeed, as will be emphasized later, no witness even testified they could cast any light in the area in which respondent was working at the time he fell.

In *Holub v. Sword S.S. Line*, 132 Fed. 2d 206 (5th Cir. 1942) 1943 A.M.C. 898, it was held that a cargo batten on which libelant was climbing was not unseaworthy when the rusty cleat holding it in place broke, since cargo battens were not intended to be used for climbing upon. Likewise, an earlier case in the Ninth Circuit held that a beam across a hatch from which a seaman had fallen was not unseaworthy in not furnishing a safe footing since the beam was not intended as a place to work.[18]

The court below, in failing to apply the proper definition of unseaworthiness to this case, acted in conflict with the decision of the Court of Appeals of the Fifth Circuit in

18. *Hunt v. Hobbs, Wall & Co.*, 42 F.2d 437 (9th Cir. 1930), 1930 A.M.C. 1390.
See also *The Queen Elizabeth*, 209 Fed. 712 (N.D. Cal. 1913).

Holub v. Sword Line, supra, as well as its own earlier decision.

Seaworthiness has always been held to mean adequate for the purpose intended and ordinarily used. This is the concept adopted by this court in *The Oseola*, 189 U.S. 158 (1903) and *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1943). Consequently the holding of the court below, that the vessel was unseaworthy when an appliance was not operating for a purpose for which never intended or customarily used, is contrary to the concept of seaworthiness adopted by this court.

4. Fourth Question Presented for Review: Sufficiency of the Evidence Adduced by Plaintiff on Essential Issues in the Case.

As indicated in the preceding portion of this petition, the court below appeared to rely in large part, in affirming the judgment of the trial court, on the fact that there was testimony in the case that certain ceiling lights in the hold were not on at the time respondent fell and that the jury could infer that, if on, they would have thrown substantial light on the place from which Williams fell. Petitioner urged in the trial court and the court below that no evidence was introduced that the ceiling lights in question would have cast any illumination whatsoever on the place from which respondent fell even if they had been on at the time. The only evidence introduced on this question at all was testimony of a witness who had made observations with the lights both on and off and noted that when on the lights did not cast any light or illumination on the place from which respondent fell. The court below, however, stated that the jury "might well have inferred that had they been on they would have cast sufficient illumination on the hatch coaming to help substantially in revealing to appellee the slippery condition of the surface on which he was about to step."

The decision of the court below on this point is in error and is in direct conflict with applicable decisions of this court and decisions of other Courts of Appeals on the same matter.

In *Penna. R. Co. v. Chamberlain*, 288 U.S. 333 (1933) this court established the applicable rule to be as follows (p. 340):

> "[R]espondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."

Under this rule it is clear that an inference of the jury that these hold lights, had they been on, would have cast sufficient illumination to have revealed the condition of the surface in question to respondent, or substantial aid, is not permissible in the face of the positive testimony of an unimpeached witness that turning on the lights in the hold does not result in any increased illumination at the point in question. As this court pointed out in the *Chamberlain* case, the fact sought to be inferred was not only essential to plaintiff's case but one on which he had the burden of proof, requiring more than a "scintilla" of evidence. Such an inference under such circumstances cannot meet that minimum requirement.

This rule has been specifically and recently applied by the Courts of Appeals of at least the Fifth, Sixth, Seventh and Eighth Circuits.[19]

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19. *Kuykendall v. United Gas Pipeline Co.*, 208 F.2d 921 (5th Cir. 1953); *Commercial Standard Ins. Co. v. Gordon's Transports*, 154 F.2d 390 (6th Cir. 1946); *Sickles v. Graybar Electric Company*, 219 F.2d 847 (7th Cir. 1955); *Barnett v. Terminal Railroad Association of St. Louis*, 228 F.2d 756 (8th Cir. 1956).

The evidence adduced by plaintiff failed to meet the minimum requirements of this court in respect to another important factual element of this case, viz., no substantial evidence was introduced that any frost was present at the point at which Williams slipped.

The point at which Williams slipped had to be first established, and the evidence introduced at trial shows without contradiction that plaintiff slipped when he had one foot on the hatch coaming and was stepping down with the other foot to descend the ladder. The court below recognized this fact where, in describing the accident, they stated that "He stepped back and down seeking to step onto a bar affixed within a recess in the coaming."

There is no substantial evidence in the record establishing the presence of any frost or moisture at that point; in fact none at all at the critical area. The only testimony on the point is to the effect that there was frost or moisture forming on the forward facing of the hatch coaming in the general vicinity of where a body was seen falling.

A witness who was able to qualify as an expert on the subject of refrigeration was called by plaintiff and testified in effect that the removal of a hatch plug from a compartment having a temperature of 10° to 12° Fahrenheit would cause frost to form on the hatch coaming area above the plug. He did not testify that such frost would form on the top of the hatch coaming from which Williams slipped or on the first rung of the ladder, below the top of the coaming where respondent in his brief contended he slipped. Furthermore, his testimony was patently in error because of the obvious fact that moisture from the air will condense on a surface only when the temperature of the surface is below the dew point of the air and will freeze thereon only when the temperature of the surface is below freezing. Obviously

the temperature of the hatch coaming, being in the outer air, was higher than the temperature of the air in the hold which was 10° to 12° Fahrenheit; consequently it could not have a temperature lower than the dew point of the air nor could it have a temperature below freezing.

In any event any inference that the jury might have sought to draw that frost or moisture had formed on the hatch coaming was an inference contrary to the only unimpeached direct evidence on the point in the record. The witness who testified on this point was an engineer who had measured the temperature of the hatch coaming immediately adjacent to the lowest recessed step above the level of the plugs under conditions substantially identical to those existing on the night of Williams' accident and had found that the temperatures at that point varied between 48° and 44½° Fahrenheit. An unsupported inference contrary to this testimony cannot be permitted to stand and is not sufficient to constitute the substantial evidence required by this court to sustain a judgment. In ruling to the contrary the court below acted contrary to the decision of this court in *Penna. R. Co. v. Chamberlain*, supra.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari herein prayed for should be granted.

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(Appendix Follows)